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No. -

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In the Supreme Court of the United States

October Term, 1989

AMAZING STORES, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

May the National Labor Relations Board disregard the rights of petitioner's present employees under § 7 of the National Labor Relations Act by compelling bargaining under the Court's *NLRB v. Gissel Packing Co.* decision despite the fact that more than 95% of these employees had been hired after the unfair labor practices concerning the representation election?

PARTIES TO THE PROCEEDINGS

Petitioner, Amazing Stores, Inc., is a privately held corporation which owns a chain of retail stores in the greater Philadelphia area.

Respondent, National Labor Relations Board, is an agency of the United States Government.

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PETITION FOR A WRIT OF CERTIORARI
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This petition raises the single question of whether the National Labor Relations Board ("NLRB") can compel *Gissel* bargaining in the face of employees' § 7 right to determine whether they wish to be represented by a union without taking evidence concerning what effect a 95% turnover in employment in the bargaining unit since the unfair labor practices may have had. Because the NLRB did not do so here, a workforce which was not involved in the union organizing drive and which did not suffer any of the unfair labor

practices found by the NLRB will be compelled to be represented by a union for at least a year before they can choose whether or not they want such representation. In upholding the bargaining order, the District of Columbia Circuit is in conflict with those other circuits which have held that the Labor Board must consider evidence of turnover before compelling bargaining in order to protect employees' § 7 rights.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia circuit (A1-A8) is reported at 887 F.2d 328. Neither the decision and order of the National Labor Relations Board (A9-A16) nor the decision and report on objections of the Administrative Law Judge (A17-A49) is officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 20, 1989. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 7 of the National Labor Relations Act provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 8(a)(1) of the National Labor Relations Act provides:

> (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

STATEMENT OF THE CASE

In December, 1985, the United Food & Commercial Workers Local No. 1357, AFL-CIO (the "Union") was rejected in a mail ballot election for the representation of petitioner's employees. The Union thereupon filed objections and charges of unfair labor practices which were tried before an administrative law judge ("ALJ") in November, 1986.

The ALJ found a series of unfair labor practices and recommended that the election be set aside and that the employer be ordered to bargain with the Union under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). Although petitioner vigorously contested the ALJ'S findings and conclusions, it does not challenge them for purposes of this petition.

In March, 1988, almost sixteen months after the hearing before the ALJ and while the matter was still pending before the NLRB, petitioner moved pursuant to NLRB Rules and Regulations § 102.48(d)(1) to reopen the record to adduce evidence that the *Gissel* bargaining order was no longer appropriate because ninety-five percent of the employees who were involved in the December, 1985 election were no longer employed by petitioner. (A50-A57.) The NLRB denied the motion and concluded, without the benefit of evidence of the effect of the change in the composition of the workforce, that "the impact of [petitioner's] violations would be likely to persist despite any turnover, thus preventing the holding of a fair election" (A9-A10, n.2). Accordingly, the *Gissel* order was adopted by the NLRB.

Petitioner appealed to the United States Court of Appeals for the District of Columbia Circuit. It argued that the *Gissel* order was inappropriate and should be vacated and the matter remanded to the NLRB to consider whether employee turnover had dissipated the effect of the unfair labor practices so that petitioner's present employees could choose for themselves whether they would be represented by the union. The court recognized that orders compelling bargaining with a union that had been defeated in a representation election

should be used sparingly because they prevent the employees from exercising their right of self-determination under Section 7. (A5).

Nevertheless, the court of appeals affirmed the order of the NLRB. It cited to footnote 2 of the NLRB decision and order and noted that the ALJ had stated that he had "no doubt that if a second election were ordered [petitioner's officers] would find the means to let their employees know that their joint will is unchanged and that the advent of the Union would mean the end of their connection with Amazing Stores." (A5-A6 citing A41.) Accordingly, the court of appeals concluded that there was no need for the NLRB to question new employees or to examine its prediction of management's future behavior.

This petition followed.

REASON FOR GRANTING THE WRIT

BECAUSE *GISSEL* BARGAINING CONFLICTS WITH EMPLOYEES' SECTION 7 RIGHT OF SELF DETERMINATION, THE NLRB SHOULD HEAR EVIDENCE CONCERNING THE DISSIPATION OF UNFAIR LABOR PRACTICES THROUGH TIME AND TURNOVER BEFORE IMPOSING SUCH AN ORDER.

The central principal of the National Labor Relations Act is contained in Section 7 of that Act, 29 U.S.C. § 157. That section sets forth in unequivocal language the right of employees to determine whether they shall be represented by a union or no union and which union, if any, it shall be. Section 8 of the Act, 29 U.S.C. § 158, makes it an unfair labor practice, *inter alia*, for an employer to interfere with its employees' Section 7 rights. In *NLRB v. Gissel Packing Co., supra*, this Court established the right of the NLRB to compel bargaining with a union defeated in a representation election where that defeat could be directly laid to the employer's interference with its employees' right to make the representation choice for themselves. Nevertheless, because the result of a bargaining order was union representation without a clear determination by those employees that they wanted that representation, such orders should be used only when a new election is not a reasonable alternative.

In the instant case, petitioner employer moved to reopen the case in order to prove the effect of the ninety-five percent turnover in the twenty-seven months following the election, approximately half of that turnover having taken place in the sixteen months since the hearing before the ALJ. That turnover was likely to have had two results: (1) the effect of the unfair labor practices on the ability of the workforce to make a free choice concerning union representation was likely to have been dissipated by time and turnover, and (2) there was now a new labor force that had never had an opportunity to exercise its Section 7 right of self-determination and should

not be bound by the NLRB's order arising from an election involving other employees at a distant time.

The identical situation had been presented to the United States Court of Appeals for the Second Circuit in *NLRB v. J. Coty Messenger Service*, 763 F.2d 92 (2d Cir. 1985). There the court was faced with a sixty percent turnover between the time of the unfair labor practices and the time of the hearing. Because the NLRB had failed to provide a reasoned analysis of the mitigating impact of that turnover, the court of appeals refused to enforce the order. Most important for this case is the fact that there, as here, the only analysis of the turnover came in a footnote which noted that "a bargaining order should still issue here since these were 'hallmark' violations with a lasting inhibitive effect." 763 F.2d at 100. The court continued: "simply adding a conclusory statement that the hallmark violations are likely to have a 'lasting inhibitive effect' does not satisfy the board's obligation to analyze whether such an effect is actually present here and how it will prevent a fair election." *Id.* Petitioner asks no more of the District of Columbia Circuit here.

The Second Circuit has repeatedly chastened the NLRB in cases where the turnover was substantially less than that shown here for its failure to analyze the effect of turnover. *See, e.g., NLRB v. Pace Oldsmobile, Inc.*, 739 F.2d 108 (2d Cir. 1984) (50%); *NLRB v. Marion Rohr Corp.*, 714 F.2d 228 (2d Cir. 1983) (35% turnover); *NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208 (2d Cir. 1980) (37.5% turnover).

Although the cases faulting the NLRB for failure to take into account the effect of time and turnover are most frequent in the Second Circuit, other circuits, as well, have refused enforcement because the NLRB has failed to take into account turnover. *See, e.g., NLRB v. Century Moving & Storage*, 683 F.2d 1087 (7th Cir. 1982); *NLRB v. Western Drug*, 600 F.2d 1324 (9th Cir. 1979). On the other hand, a divided Fifth Circuit has supported the position taken by the court below in this case that the NLRB need not reopen the record to con-

sider turnover. See *Bandag, Inc. v. NLRB*, 583 F.2d 765 (5th Cir. 1978).

There is no question but that denial of petitioner's motion to reopen the record would have vitiated the bargaining order in the Second Circuit. See *NLRB v. Pace Oldsmobile, Inc., supra,* and *NLRB v. Knogo Corp.*, 727 F.2d 55, 60 (2d Cir. 1984), in which the court specifically refused to enforce bargaining orders because the NLRB would not reopen the record for evidence of the effect of turnover. Identical refusal had no such effect here. Given the importance of the question and the frequency with which it arises, this conflict in circuits should be resolved, particularly because cases in a number of other circuits make it difficult to predict what positions those courts would take with the same question. Given the frequent use of *Gissel* bargaining orders by the NLRB, it is vital that that conflict be ended.

More important, however, is the effect of a bargaining order in the face of extensive employee turnover. As the Second Circuit noted in *Knogo,* 727 F.2d at 60: "when there has been a large turnover in employees between unfair practices and a Board's order, '[t]he effect of a bargaining order could thus easily be to impose upon the employees a union not desired by the majority of them,' " citing *J.J. Newberry Co. v. NLRB*, 645 F.2d 148, 154 (2d Cir. 1981). That imposition of unchosen representation, moreover, cannot be challenged by the new employees for one year from the beginning of collective bargaining under the *Gissel* order. *See Brooks v. NLRB,* 348 U.S. 96 (1954); *National Medical Hospital,* 287 N.L.R.B. No. 18, 127 L.R.R.M. 1065 (1987). Given the crucial importance of employees' Section 7 rights to self-determination and the danger to those rights which a bargaining order imposes, it is clear that such orders should be used sparingly. The multitude of cases involving *Gissel* which have reached the courts of appeals in recent years suggests that the NLRB has failed to recognize that fact and that this Court must act if the right of self-determination is to be preserved.

CONCLUSION

For all of these reasons, petitioner respectfully requests that its petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia be granted.

Respectfully submitted,

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Dated: January 18, 1990

APPENDIX

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 14, 1989 Decided October 20, 1989

No. 88-1693

AMAZING STORES, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

Petition For Review of an Order of
the National Labor Relations Board

Laurance E. Baccini of the bar of the Supreme Court of Pennsylvania, *pro hac vice,* by special leave of the Court, with whom *Thomas E. Patton* was on the brief, for petitioner.

Joseph A. Oertel, Attorney, NLRB, with whom *Paul J. Spielberg,* Deputy Assistant General Counsel, and *Aileen A. Armstrong,* Deputy Associate General Counsel, NLRB were

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Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

on the brief, for respondent. *Frederick C. Havard* and *Collis Suzanne Stocking,* Attorneys, NLRB also entered appearances for respondent.

Before: MIKVA, WILLIAMS and GINSBURG, D.H., *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* MIKVA.

MIKVA, *Circuit Judge:* Petitioner, Amazing Stores, Inc., challenges an NLRB order arising from its unfair labor practices in a December 1985 representation election. Petitioner claims that the Board's use of a *"Gissel"* remedy, setting aside the election and requiring it to recognize the union for the purpose of collective bargaining, was inappropriate because there had been substantial turnover in the workforce since the earlier election campaign. Petitioner also argues that the Board's findings of outrageous and pervasive misconduct were not supported by substantial evidence, and that the Board did not support its conclusion that a card-based majority of employees favored union representation. We find that imposition of a *Gissel* bargaining order was warranted and that the Board's order should be enforced.

Background

In *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969), the Supreme Court established that the NLRB may issue a bargaining order (*"Gissel* order") to remedy violations of section 8(a) of the National Labor Relations Act ("NLRA") if the Board finds, on balance, that the effects of those past practices make a fair election unlikely. *Id.* at 614-15. This case presents us with an opportunity to clarify the amount of consideration that the NLRB must accord subsequent employee turnover in determining whether an employer's misconduct continues to prevent the possibility of a fair election. Based upon our review of the record, we find that the Board gave adequate consideration to employee turnover and was justified in concluding that the effects of petitioner's outrageous and pervasive misconduct are likely to taint any future elections.

Petitioner, Amazing Stores, Inc., owns and operates a chain of retail discount stores in greater Philadelphia. On

October 29, 1985, a representative of the United Food and Commercial Workers, Local 1537, AFL-CIO ("Union") met with a group of Amazing Stores' stock clerks, drivers, and cashiers for the purpose of launching a representation election. Of the 36 members of the "bargaining unit," 22 returned cards expressing a desire for Union representation, five of which were dated before October 29.

When Amazing Stores' owners subsequently refused to recognize the Union for purposes of collective bargaining, the Union initiated a representation election. Prior to the election, two of the Stores' owners, Jack Segal and Joseph Lieberman, began a systematic effort to discourage Union support. Specifically, the Board found that they discharged an employee for Union organizing, delayed and in some cases denied Christmas bonuses, coercively interrogated employees and created an impression that they were under surveillance, promised advancement for voting against the Union, and threatened to sell the stores to outside investors if the Union prevailed.

Following the election, the Union filed charges with the NLRB. After a hearing in November 1986, the ALJ found that Amazing Stores had engaged in unfair labor practices in violation of NLRA § 8(a)(1), (3), and (5). The ALJ recommended that Amazing Stores be ordered to stop these practices and restore all employees to the status quo. He further recommended that the election be set aside and the employer be issued a *"Gissel"* order—requiring it to bargain with the Union. Decision and Report on Objections, 4-RC-19096 (ALJ Decision) at 19-20.

Before the Board issued its Decision and Order (Board Order) in June 1988, Amazing Stores filed a Motion to Reopen the Hearing to challenge the *Gissel* order because there had been 95% employee turnover in the bargaining unit since the close of the hearing. The Board denied this motion and affirmed the ALJ's conclusions in relevant part.

I

Preliminary Claims

Amazing Stores makes two preliminary claims respecting the Board's decision to issue a *Gissel* order: first, the order is not supported by substantial evidence of misconduct sufficiently serious to warrant the issuance of a bargaining order in lieu of a rerun election, and second, the Board lacked evidence of preexisting majority support to justify the order. We reject both contentions.

We find ample evidence to support each of the ALJ's conclusions. Furthermore, we note that the ALJ's unchallenged findings are alone sufficient to support the Board's conclusions. Petitioners do not dispute that the owners of the company threatened to sell the plant, coercively interrogated employees, promised improved working conditions, solicited grievances, delayed the granting of Christmas bonuses, and denied a bonus to two employees. We have held that a similar litany of unfair labor practices supported a *Gissel* order in *Road Sprinkler Fitters Local Union No. 669 v. NLRB (John Cuneo, Inc.)*, 681 F.2d 11, 24 (D.C. Cir. 1982). There, we concluded that coercive interrogation, creating the impression of surveillance, prohibiting Union discussion, and delaying reinstatement of workers were sufficient to justify issuance of a bargaining order. *Id.* at 23-24. Thus, both on the merits and on the basis of the uncontested evidence, we affirm the NLRB's finding of substantial evidence to support a *Gissel* order.

Similarly, Amazing Stores' challenge to the sufficiency of the card-based majority is meritless. Amazing Stores' sole contention is that 5 of the 22 cards favoring the Union were dated before the organizing campaign began on October 27. Amazing Stores argues that this raises "serious doubts" about the Union's majority status. Amazing Stores, however, has already stipulated to the authenticity of the cards. ALJ Decision at 17-18. Thus, its "argument" is nothing more than a suggestion that a card-based majority existed between Oc-

tober 4 and November 15 rather than between October 29 and November 15: a difference without legal significance. Accordingly, we also affirm the ALJ's finding that there was sufficient objective evidence of a card-based majority to warrant a *Gissel* order.

II

The Effect of Significant Turnover

The crux of Amazing Stores' case is that the Board erred in issuing a *Gissel* order without fully considering whether employee turnover may have dissipated any lasting effects of the unfair labor practices. Accordingly, it has requested that the court remand the *Gissel* order to the NLRB to require it to determine and articulate whether turnover or the lapse of time have eliminated the effects of the unfair labor practices.

As noted, *Gissel* orders have been reserved as a remedy for those situations where past unfair practices have been so pervasive and extensive that they effectively prevent the holding of a fair election. The *Gissel* Court advised the Board to impose such orders sparingly because they override the election process, thereby foreclosing the employees from directly expressing their preferences. This circuit held in *Peoples Gas System, Inc. v. NLRB*, 629 F.2d 35 (D.C. Cir. 1980), that a bargaining order must: (1) give due consideration to the employees' Section 7 right to self-determination; (2) state why the remedy is necessary; and (3) explain why other remedies are inadequate. *Id.* at 46. Amazing Stores contends that the Board failed to satisfy each of these requirements.

Amazing Stores claims that the Board failed adequately to take into account an almost complete turnover of personnel in the bargaining unit since this action started. Thus, it moved to reopen the hearing to submit turnover evidence, a motion the Board addressed in footnote 2 of its Decision and Order. The Board found that since the misconduct was committed by the highest management officials and was directed at virtually every employee in the bargaining unit, it was foresee-

able that new employees would learn of the past practices and be deterred from seeking Union representation. Board Order, 289 NLRB No. 24, n.2. Furthermore, it referred to a section of the ALJ's order in which he stated that he had "no doubt that if ... a second election were to be ordered, Lieberman and Segal would find the means to let their employees know that their joint will is unchanged and that the advent of the Union would mean the end of their connection with Amazing Stores." ALJ Decision at 18.

Amazing Stores rests its claim of inadequate attention to turnover largely upon our statements in *NLRB v. Creative Food Design Ltd.*, 852 F.2d 1295 (D.C. Cir. 1988). We there stated that "In evaluating whether the unfair labor practices continue to have 'an *actual chilling* effect on the possibility of a fair and free election,' the Board must determine how many current employees were directly exposed to, and possibly influenced by, the employer's measures." *Id.* at 1302 (citation omitted). Petitioner insists that *Creative Food* requires that the Board make specific factual findings that the present employees' interests have been affected by the past misconduct.

Petitioner, however, misunderstands our holding in *Creative Food*. Our statements in that case were never meant to suggest that the Board must always adduce direct evidence of the continuing effects of prior misconduct. Rather, determination of whether a *Gissel* order is necessary rests on consideration of both the nature and pervasiveness of the employer's misconduct as well as the amount of turnover. Where the Board finds that a practice is particularly pervasive or enduring, it need make only minimal findings that the effects have not been dissipated by subsequent employee turnover. Conversely, where the practices at issue are not especially pervasive or permanent in nature, the Board needs to make more careful determinations respecting the effect of subsequent employee turnover. *See e.g., St. Agnes Medical Center v. NLRB*, 871 F.2d 137, 147-49 (D.C. Cir. 1989) (remanding a *Gissel* order where findings of unfair practices were largely unsupported and the ALJ made only a conclusory determination about the possibility of conducting a fair election). Here, the

Board clearly satisfied *Creative Food*'s requirement that it "determine how many current employees were ... possibly influenced by, the employer's measures" (852 F.2d at 1302), by drawing reasonable inferences from the extreme, pervasive, and entrenched character of the misconduct.

This formulation comports with reasoned policy. Where the Board finds that employer misconduct is pervasive and likely to persist despite turnover, these conclusions alone are sufficient to satisfy the turnover inquiry. Forcing the NLRB to question new employees as to their knowledge of earlier representation elections is not only unnecessary to support its conclusion, but also would have the bizarre effect of alerting new employees to their employers' antipathy to union organization. Moreover, by requiring a more elaborate turnover inquiry under these circumstances, companies with naturally high turnover would be tempted to engage in unfair practices, knowing that over the course of protracted administrative proceedings they can outlast any union activists and effectively stall existing momentum for unionization. As we noted in *St. Francis Federation of Nurses & Health Professionals v. NLRB*, 729 F.2d 844, 856 (D.C. Cir. 1984), "normal employee turnover [does not] justify displacing the Board's determination ... Imposition of a requirement that the Board consider subsequent events would reward an employer's efforts to postpone enforcement of a remedy by adding further delay to the proceedings."

We find that the Board's explanation was firmly rooted in the record of this case and satisfied all three prongs of *Peoples Gas, supra*. First, the Board reflected due concern for the employees' Section 7 rights by considering the impact of turnover, and determining that it was not sufficient to dissipate management's entrenched and pervasive misconduct. Second, the Board properly explained why a bargaining order was necessary; it noted that the effects of the specific conduct involved here were likely to persist based upon findings that the owners "meant what they said" about closing or selling the stores, and that "given another opportunity, they would resume a pattern of unlawful conduct." ALJ Decision at 18.

Finally, the Board properly found that alternative remedies were inadequate given the continuing presence of senior management and testimony that these managers would resume their misconduct. Based on these findings, it was reasonable for the Board to predict that a coercive atmosphere would be "likely to persist" which would frustrate attempts at a fair election. Board Order, 289 NLRB No. 24 at 1-2.

Thus, we find that the Board was justified in determining that a *Gissel* order was warranted. By examining the unique durability of petitioner's past misconduct and the likelihood of its repetition, the Board satisfied the prerequisites that this and other courts have prescribed.

Affirmed.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

AMAZING STORES, INC.

and

Cases 4—CA—15602
4—CA—15683
4—RC—16096

UNITED FOOD AND
COMMERCIAL WORKERS
INTERNATIONAL UNION,
LOCAL 1357, AFL-CIO

DECISION AND ORDER

On July 27, 1987, Administrative Law Judge George F. McInerny issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed exceptions, a supporting brief, and a response brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

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1. The Respondent and the General Counsel have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

2. The Respondent filed a motion to reopen the hearing to adduce additional evidence regarding the turnover of employees. The Respondent argues, as it has at the hearing and in its exceptions, that a bargaining order is not warranted because the turnover of the employees would dissipate any lingering effects of its alleged unfair labor practices and thus would not prevent the conducting of a second election.

The motion is denied. The Respondent's unfair labor practices were pervasive and serious and committed by the highest management officials. The misconduct was directed at virtually every employee in the bargaining

We agree with the judge's finding that the Respondent violated Section 8(a)(3) of the Act by refusing to pay Gail Davis her Christmas bonus and by her subsequent discharge in January 1986. Davis was a long-term employee who had worked with Lieberman and Segal, the owners of the Respondent, for 5 years when she was discharged.[3] The judge found and we agree that during the organizational campaign Lieberman and Segal visited the stores in order to conduct one-on-one interviews with employees in which they repeatedly committed violations of Section 8(a)(1) of the Act. It is clear that when the owners came to the store in which Davis worked in early December 1985 and she was informed by her store manager that the owners wished to discuss the Union with her in the store's backroom, she declined to participate. This action on Davis' part displayed a lack of receptivity to the Respondent's antiunion message, which message as noted above we have found violative of Section 8(a)(1) of the Act. This refusal provided the Respondent with reason to infer that Davis was sympathetic to the Union. It was this very refusal to participate in the antiunion discussion with the owners that her store manager referred to when Davis questioned him about why she was the only employee in her store not to receive a Christmas bonus some 3 weeks later. Davis' understandable reaction to this discriminatory refusal to award her a Christmas bonus was to inform her store manager that she would be leaving work early that day. The store manager expressed no problem with Davis' decision to leave early and, thus for the reasons stated in the judge's decision, we agree with his conclusion that Davis had not resigned but rather was discharged in violation of Section 8(a)(3) of the Act.

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unit. So extensive were the unlawful acts that it is foreseeable that the Respondent's record of coercion would become known to new employees and the impact of the Respondent's violations would be likely to persist despite any turnover, thus preventing the holding of a fair election.

3. We think it is appropriate to term Davis a long-term employee in light of the Respondent's repeated arguments that turnover at the stores is significant.

We also agree with the judge's finding that Ralph Atwell was denied a Christmas bonus and pay raise because of his union activities. The Respondent admitted that it reviewed all employees for pay raises in January 1986. Atwell, whom the judge credited over the Respondent's witnesses, testified that in January 1986 when he requested a pay raise, the only reason Segal gave for denying a raise was that Atwell had given them a difficult time about the Union. Segal had previously confronted Atwell with the allegation that he had heard that Atwell was the ringleader in the Union. Thus, the Respondent's motivation is clearly shown.

We affirm the judge's analysis and conclusion that the Respondent's unlawful conduct warrants a bargaining order under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). However, in order to require the Respondent to bargain with the Union it is necessary to set aside the election. *Irving Air Chute Co.*, 149 NLRB 627 (1964), enfd. 350 F.2d 176 (2d Cir. 1965). As noted in the judge's decision, a mail ballot election was conducted from December 19 through 30, 1985; the Union filed timely objections to the election which track the unfair labor practice allegations. The conduct found by the judge to be violative of Section 8(a)(1) and (3) is sufficient to warrant setting aside the election and we do so. *Dal-Tex Optical Co.*, 137 NLRB 1782 (1962).

The judge in his remedy recommended that the Respondent be ordered "not to discontinue its operations, at any of its locations." We find that remedy inappropriate. There is no charge, allegation, or finding that the Respondent discontinued any portion of its operation due to the union activities of its employees. Rather, the allegation is that the Respondent threatened to take such action. Having found that the Respondent violated the Act by threatening its employees with store closure, the judge provided the appropriate remedy, i.e., an appropriate order and the posting of a notice with the requisite language. The judge's proposed remedy goes further and attempts to remedy possible prospective action of the Respondent. In the event the Respondent does close any of its operation because of the activities of its employees on behalf

of a union or any other protected activity, charges may be filed, an investigation initiated, and if necessary a complaint issued. At that time, if the allegation is proven, a proper remedy will be ordered. Accordingly, the remedy is modified.

The judge granted a visitatorial provision. Under the circumstances of this case we find it unnecessary to grant such provision. *Cherokee Marine Terminal*, 287 NLRB No. 53 (Jan 28, 1988).

In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB No. 181 (May 28, 1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendments to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Amazing Stores, Inc., Philadelphia, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(b) and reletter the subsequent paragraphs.

2. Reletter current paragraph 2(e) as paragraph 2(f), delete current paragraph 2(f), and add the following as paragraph 2(e).

"(e) Remove from its files any reference to the unlawful discharge and notify the employee in writing that this has been done and that the discharge will not be used against her in any way."

3. Add the following as paragraph 2(g).

"(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply."

4. Substitute the attached notice for that of the administrative law judge.

IT IS FURTHER ORDERED that the election in Case 4—RC—16096 is set aside, and the petition is dismissed.

Dated, Washington, D.C. June 15, 1988

Wilford W. Johansen, Member

Marshall B. Babson, Member

Mary Miller Cracraft, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate our employees concerning their union activities, nor give them the impression that their union activities are under our surveillance, nor threaten our employees with closure or sale of our stores, nor promise increased benefits to our employees or threaten to take away their benefits, because they have engaged in union activities.

WE WILL NOT terminate any of our employees nor deprive them of bonuses or pay raises to which they are entitled because of their activities on behalf of the Union or any other labor organization.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full-time and regular part-time sales personnel, stock personnel, cashiers and truck drivers employed by the Employer at its 816 Chestnut Street, 1124 Chestnut

Street, 1621 Chestnut Street, 7140 Frankford Avenue, 5645 N. 5th St., Academy Plaza, Academy and Red Lion Rds., and 139 W. Chelten Ave., Philadelphia, Pennsylvania locations and its Sharon Hill Plaza, Chester Pike, Sharon Hill, Pennsylvania, 734 Hamilton Street, Allentown, Pennsylvania locations, excluding all other employees, guards and supervisors as defined in the Act.

WE WILL offer Gail Davis immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed and WE WILL make her whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL notify her that we have removed from our files any reference to her discharge and that the discharge will not be used against her in any way.

WE WILL make Ralph Atwell whole for any loss of wages incurred as the result of his being denied a raise by payment of the appropriate sums of money involved, with interest.

WE WILL make Gail Davis and Ralph Atwell whole for any monetary losses they may have suffered by reason of our failure to pay them the 1985 Christmas bonus, with interest.

AMAZING STORES, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this

notice or compliance with its provisions may be directed to the Board's Office, 1 Independence Mall, 7th Floor, 615 Chestnut Street, Philadelphia, Pennsylvania 19106, Telephone 215-597-7643.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

AMAZING STORES, INC.

and

Case 4—CA—15602
4—CA—15683

UNITED FOOD AND
COMMERCIAL WORKERS,
LOCAL 1357, AFL-CIO

AMAZING STORES, INC.

and

Case 4—RC—16096

UNITED FOOD AND
COMMERCIAL WORKERS,
LOCAL 1357, AFL-CIO

Susan L. Stahl, Esq., and Henry R. Protas, Esq., of Philadelphia, Pennsylvania, for the General Counsel.
Laurance B. Baccini, Esq. and Dale P. Schomer, Esq., on the Brief *(Schnader, Harrison, Segal & Lewis)* of Philadelphia, Pennsylvania, for the Respondent.

DECISION AND REPORT ON OBJECTIONS

GEORGE F. McINERNY, Administrative Law Judge: This case arises out of several matters filed by United Food and Commercial Workers Local No. 1357, AFL-CIO, herein referral to as the Union, with the Philadelphia Regional Office of the National Labor Relations Board, herein referred to

respectively as the Regional Office and the Board. The first matter was a Petition filed by the Union on 15 November 1985,[1] in Case No. 4—RC—16096 seeking an election to be conducted by the Regional Office under the provisions of the National Labor Relations Act, U.S.C. 151 *et seq.*, herein referred to as the Act, and certification of the Union as bargaining representative for a unit of employees of Amazing Stores, Inc., herein referred to as Respondent, or the Company. After a stipulation by the Union and the Company, approved by the Regional Office, an election was held by mail ballot between 10 and 30 December among the Company's employees. The Union lost the election and filed a series of objections to conduct by the Company which, it was said, affected the results of the election. On 16 July 1986, the Regional Office referred the matter to an Administrative Law Judge for a report on the objections.

Meanwhile, the Union filed a charge against the Company on 10 February 1986, in Case No. 4—CA—15602, and on 20 March 1986, in Case No. 4—CA—15683, containing allegations that the Company had violated Section 8(a)(1), (3) and (5) of the Act. Then, on 31 July 1986, the Regional Office consolidated all of these cases and issued a Complaint and Notice of Hearing on the consolidated matter. Respondent filed a timely answer denying the commission of any unfair labor practices.

Thereafter, on 17, 18 and 19 November 1986, a hearing was held before me at Philadelphia, Pennsylvania at which the Respondent and the General Counsel were represented by Counsel, and had the opportunity to present testimony and documentary evidence, to examine and cross-examine witnesses, to present motions and to make objections, and to argue orally. After the close of the hearing, both the Respondent and the General Counsel submitted briefs, which have been carefully considered.

Based upon the entire record, including my observations of the witnesses and their demeanor, I make the following:

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1. All dates herein are in 1985 unless otherwise specified.

FINDINGS OF FACT

I. JURISDICTION

The Complaint alleges, the Answer admits, and I find, that the Respondent is a Pennsylvania corporation which maintains retail stores in the City of Philadelphia, and at Sharon Hill and Allentown, Pennsylvania. During the year immediately preceding the issuance of the Complaint, Respondent derived gross revenues in excess of $500,000 and purchased goods valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Complaint alleges, the Answer admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background and Stipulations

Amazing Stores, Inc., is a chain of nine retail stores selling housewares and giftwares, consisting mainly of closeouts or imports, in the city of Philadelphia and its vicinity. The Company is owned by four individuals, Joseph Lieberman, Jack Segal (Glenn Segal), Jack's son and Sidney Burezin. It appears from the evidence here that Jack Segal and Joseph Lieberman, referred to respectively as Segal and Lieberman, handle the day-to-day management of the enterprise, assisted by sundry store managers and assistant managers.

It was stipulated by all parties that an appropriate unit for collective bargaining composed:

> "All full-time and regular part-time sales personnel, stock personnel, cashiers and truck drivers employed by the Employer at its 816 Chestnut St., 1124 Chestnut St., 1621 Chestnut St., 7140 Frankford Ave., 5645 N. 5th St., Academy Plaza, Academy & Red Lion Rds., and 139 W.

Chelten Ave., Philadelphia, PA locations, and its Sharon Hill Plaza, Chester Pike, Sharon Hill, PA, 734 Hamilton St., Allentown, PA locations, excluding all other employees, guards and supervisors as defined in the Act."

It was further stipulated that the following named employees were employed in the stipulated bargaining unit during the period from October 1, 1985 through November 15, 1985:

1. Roger Parker
2. Curtis Bond
3. Lisa Huffnagle
4. Chander Lewis
5. Maurice Monroe
6. Robert Young
7. Margaret Smith
8. John De Marco
9. Nancy Powell
10. Curtis Snyder
11. Debbie Bruner
12. Dan Dihert
13. Arlene Tolliver
14. Atoinette Walker
15. Celia Abraham
16. Geneva Henry
17. Edward Manwiller
18. Robert Snyder
19. Ralph Atwell
20. Jerome Thomas
21. Francine Wilson
22. Francys Cotto
23. Joyce Florence
24. Ed Hutton
25. Marlo Jackson
26. Ritchie Jarmon
27. Bruce Kraskow
28. Sandy Giordano
29. Kenneth Phillips
30. Bob Cressman
31. Ellen Faragasso
32. Sid Parker
33. Peggy Russo
34. Steve Calhoun
35. Gail Davis

It was further stipulated that certain of these employees had signed cards authorizing the Union, 1357 to represent them for purposes of collective bargaining; that the signatures on certain authorization cards are authentic, and that the cards were signed on or about the dates appearing thereon; and that the authorization cards received in evidence here are authentic. The names of the individuals so stipulated, and the dates appearing on their cards, are listed below:

1. Chander Lewis Oct. 29, 1985
2. Marlo Jackson Nov. 5, 1985
3. Francys Cotto Nov. 1, 1985
13. Francine Wilson Oct. 25, 1985
14. Marie Barseghian Nov. 4, 1985
15. Karen Andrews Nov. 4, 1985

4. Kenneth J. Phillips Oct. 4, 1985
5. Joyce Florence Nov. 3, 1985
6. Curtis Leroy Bond Nov. 3, 1985
7. Arlene Siers Nov. 13, 1985
8. Curtis Snyder, Jr. Nov. 25, 1985
9. Sidney R. Parker Nov. 3, 1985
10. Richardson Jarman Nov. 3, 1985
11. Steven Carl Calhoun Oct. 25, 1985
12. Jerome Thomas Nov. 11, 1985
16. Ralph Atwell Nov. 2, 1985
17. Lisa Huffnagle Nov. 3, 1985
18. John Di Marco Nov. 7, 1985
19 Roger Parker Nov. 3, 1985
20. Edward Hutton Oct. 25, 1985
21. Robert Cressman Nov. 13, 1985
22. Arlene Tolliver Nov. 2, 1985
23. Nancy E. Powell Nov. 8, 1985
24. Gail Davis Oct. 29, 1985

The parties agreed not to agree on the status of three individuals, Marie Barseghian, Arlene Siers and Karen Andrews. The General Counsel and the Union contend that these people were permanent full-time or regular part-time employees who should be included in the above-stipulated unit, the Company arguing that they were temporary employees who should be excluded from the said unit. Karen Andrews testified that she was hired as a full-time, permanent employee. However, Joseph Lieberman testified that Andrews was "seasonal." He said he did not "plan on her" being permanent, but admitted that at no point was Andrews told she was only temporary. Ellen Nancy Faragasso, the manager of the Company's Frankford Avenue Store, testified that Andrews was only temporary. I cannot find on this evidence, that Andrews was a permanent full-time employee from October to December, 1985.

Barseghian did not testify, but Faragasso and Lieberman testified that she was hired in September or October, and resigned, of her own accord, in June, 1986. There is no indication that she could not have continued to work if she had not resigned. I find Barseghian to have been a full-time, permanent employee in October, November and December, 1985.

Arlene Siers did not testify and there was no evidence in this record on her status. I make no finding as to whether she was a full-time, permanent employee.

Based upon these findings, I would add the name of Barseghian to the stipulated list of employees given above, making a total of 36 names. I would then delete the name of Arlene Siers from the list of card-signers, leaving 23 names.

Since a total of 18 persons would constitute a majority of the employees stipulated as being in the unit, I find, referring to the stipulated dates on the cards, that the Union had a majority, in effect stipulated to by the parties, on and after 7 November 1985.

B. Organization and Request for Recognition

John Myerson, an organizing representative for the United Food and Commercial Workers Union, testified that he received a telephone call on 27 October from Steve Calhoun, an employee of the Company, indicating an interest in organizing a union at the Company. On 29 October, a meeting was held at a Roy Rogers restaurant in downtown Philadelphia between Myerson and four employees representing the Company's three Chestnut Street stores. Myerson explained what had to be done to organize the stores, and he distributed authorization cards to the employees who were there.

Additional meetings were held, on 3 November at the home of employee Ralph Atwell, and on 24 November at the Union's offices. By the second week in November, as stated by Myerson, and as I have already found, the Union had valid authorization cards from a majority of the employees in the bargaining unit.

On Friday, 15 November, Myerson and another Union representative went to the Company's office at 4530 Lacony Street and, there spoke to Jack Segal. The Union representatives presented Segal with a letter demanding recognition, and, according to Myerson, told him that they represented a majority of the Company's employees, and requested that he recognize the Union as the bargaining representative for the Company's employees. Segal then asked if they knew how many people were employed at Amazing Stores. When the Union representatives told him, Segal accused these people of being "ingrates" and pointed out that he had personally helped many of his employees during the course of their employment, and finally, said he was going to refer the matter to his attorney.

Segal's version of this meeting stated that the Union

representatives began by telling him that they had, not a majority, but over 30 percent signature cards. Segal asked if he could see the cards and was refused. He then denied that he had used the word "ingrates" to describe his employees, but did say that he told the Union representatives that he could not understand why his employees had gone to the Union, emphasizing his generosity and fairness to the employees.

The testimony by Myerson that he requested recognition based on a Union majority is much more logical than Segal's statement that the Union representatives said only that they had over 30 percent of the people signed up. There would have been no point in Myerson's trip out to the Company's headquarters if all he was going to say was that the Union had over 30 percent cards signed. He could have notified the Company of that either directly, by letter, or by filing a petition with the Board's Regional office. That office, in turn, would have notified the Company. Segal must have been referring to his testimony to something he had heard, somewhere, about an administrative requirement for 30 percent cards signed in order to process an election petition.[2] While I found Segal to be a truthful witness, I think that his testimony shows that he did not have a good memory in recalling individual conversations which occurred in connection with this case. In this instance, as in others, Segal just did not accurately recall the content of the conversation with Myerson and his associate.

C. The Company's Reaction

Whether or not Segal actually used the word "ingrates" in referring to his employees, there is no dispute that he was hurt and upset by the news that the employees had selected, or were going to select, a Union to represent them. He had, according to his testimony, never had trouble negotiating with any of his employees. He felt that he had never been unfair to

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2. Lieberman testified that Segal told him that the Union men told him that they had a "majority of our employees signing cards that they wanted a Union."

any employee. He did not recall ever turning down an employee for a raise, and did recall many instances where raises were given without even a request by the employee. He had never refused anybody within reason, he had helped people buy houses, helped them in times of stress, had lent money constantly at no interest, even though he had to pay interest when he borrowed.

Moreover, Segal testified, he personally felt that if the Company had a Union, he just, at this stage in his life,[3] didn't want strangers dictating to him. He therefore decided that if they had a Union he just couldn't live with it.

A few days after the 15 November meeting Lieberman and Glenn Segal returned to Philadelphia from out-of-town and, the three of them sat down to discuss the Union situation. Segal told his associates that if the Union came in he would like to take his share of the equity in the Company in stores rather than in dollars. He would then sell these stores for dollars. Two of the three other owners of the business, Glenn Segal and Sidney Burezin, did not testify at this hearing. Lieberman did testify, and stated that he, too, was going to sell the stores if the Union came in.

There is no indication, in this record, of any discussions among management people of any concerted plan of opposition to the Union. Segal and Lieberman both testified that during the Union campaign, in November and December, they heard from their store managers that the union activity was upsetting employees and impairing efficiency in the stores. Segal and Lieberman therefore determined to visit the stores and talk to as many individual employees as would talk to them about the Union and its impact on the Company.[4] Segal tried to downplay the fact that he and Lieberman visited all the stores and made efforts to contact, personally, each and

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3. Segal is not a young man, but he appeared trim and vigorous—certainly not doddering nor incapable of the daily tasks in running a business.

4. Segal and Lieberman were accustomed to visiting all of the stores on a regular basis, but they did not as a rule stop and talk to employees during those visits other than to exchange greetings or pass the time of day.

every employee with their message of opposition to the Union, but he did not deny that this is what he and Lieberman did.

The procedure followed was for Segal and Lieberman, or one or the other of them, to go to a store and have the manager ask the employees to come to a back room to talk with whichever manager was present.[5] It is the content of these meetings which is alleged by the General Counsel to contain violations of Section 8(a)(1) of the Act.

D. The Alleged Violations of Section 8(a)(1)

The General Counsel brought in a number of witnesses who testified as to matters contained in the complaint. The testimony of these witnesses consisted principally of reports of the meetings held by Segal and Lieberman, together or separately. All of the General Counsel's witnesses agreed that they were asked to participate in these meetings either on request of the store managers or by encountering Segal or Lieberman in their stores. After listening to a number of these witnesses relate substantially identical versions of what occurred in these meetings I declined to allow the General Counsel to adduce further testimony on the proposed sale of the stores or the promises of improved working conditions. Offers of proof made by the General Counsel did not induce me to change my mind. At the most, the additional evidence proposed to be adduced would have been redundant, merely adding additional testimony on the same type of allegations for which this decision will afford adequate relief.

With a single exception,[6] I found the General Counsel's witnesses to be generally credible. Although no one, either the witnesses for the General Counsel or the Respondent, were very precise on dates or details, this is not a case which

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5. The evidence is undisputed that Segal did most of the talking, but Lieberman joined in from time to time. Several employees could not remember which of the managers said what at their meeting.

6. Employee Roger Parker seemed to me to be a pre-occupied witness with only a limited sense of his relation to the subject matter of his testimony. I do not credit his statements regarding the issues herein.

will turn on the exact day or hour a particular event occurred. The facts as related by the General Counsel's witnesses concerning the threats to close the stores, or to sell out to Korean purchasers were consistent, were mutually corroborated without appearing staged, and were frankly admitted by Segal and Lieberman. Similarly, other complaint allegations including promises of benefits, solicitation of grievances, withholding of bonuses from individuals and from all the employees, were consistently related by employee witnesses and not seriously controverted by the Respondent's witnesses. In other parts of the Complaint, including the alleged discharge of Gail Davis and the layoff of Karen Andrews, there are some issues of credibility which I attempt, below, to resolve.

Turning to the specific testimony, Francys Cotto, an employee of the Company's store at 16th and Chestnut Streets, testified that about 2 weeks before the ballots were to be turned in to the Board's Regional Office, her manager, Trace Dribier, told her to go to the back of the store and talk to Segal and Lieberman. According to Cotto both Segal and Lieberman talked to her. They said that things were going to get better if they didn't have a Union. They also said that they would sell the store if they had a Union. Segal did not deny this last statement, adding, in his testimony concerning this meeting, that he didn't want anyone putting a hand in his pocket, and that his plans were to sell some of the stores. Lieberman testified that Cotto told Segal and he that she was being harassed by other employees, but he had no memory of what Segal may have said to Cotto.

Marlo Jackson, an employee at the 11th and Chestnut Streets store at the time of the Union campaign testified that his manager, Joe Giordano, told him that Segal and Lieberman wanted to meet with him in the back room of the store. Jackson went to the back room and met with Segal and Lieberman. Segal did most of the talking telling Jackson that if the Union got in they would sell the stores, but if not, the employees would get a raise. Jackson further said that the employees discussed their conversations with Segal and Lieberman and the selling of the stores. About 2 weeks after

this conversation, Jackson said he saw "Sid" Burezin, one of the Company's owners, in the store showing an "oriental man" around the premises. Neither Segal nor Burezin testified about the matter.

Robert Cressman worked at the Frankford Avenue Store at the time of the Union campaign, and at the time he testified here, almost a year later, he had been promoted to manager at the 1124 Chestnut Street location. Cressman testified that Lieberman approached him in the back room of the Frankford Avenue store in mid-December and asked if he knew anything about the Union. At this time Cressman had signed a Union authorization card, had given a card to another employee, Karen Andrews, and had attended at least one Union meeting. However, he replied to Lieberman's question by saying no. Lieberman said that he thought Cressman would know about the Union because Ralph Atwell, the Company's driver and deliverer "was going around telling people" about the Union.

A bit later Lieberman again asked Cressman what he thought about the Union. Cressman answered that he didn't care. He said that he needed his job, and asked Lieberman for medical coverage and a transfer out of that store. Lieberman responded to this by saying that he would get Cressman out of that store by March, and would see what he could do about medical coverage.

At another meeting, in about the same period, and on a Friday night, Lieberman, together with Jack and Glenn Segal, engaged Cressman in conversation. Cressman said they were all talking, again asking about the Union, and again he said he didn't care about it. They told him that if the Union came in they would sell the stores individually to Koreans and that the employees would lose their jobs. After this Cressman stated that he saw Lieberman in the Frankford Avenue store accompanied by a "Korean" man.

At the time that the employees were preparing the mail ballots to send to the Board's Regional office, Cressman testified that he overheard Lieberman telling employees Marie

Barseghian and Sid Parker[7] that if they brought their ballots in to him he would stamp and mail them.

Lieberman had very little precise recollection about these conversations. He did state that Cressman had told him he did not care about the Union, but could not recall who initiated the discussion about the Union. Lieberman further verified that he told Cressman that "we would be moving him up," and that the Company would sell the stores if the Union came in. Lieberman testified that he told employees to be sure to vote and to get their ballots in. He did say that Barseghian had offered to show her ballot to him, but that he told her that she didn't have to prove anything to him. Segal testified that he did not remember much about the interviews with Cressman.

Lisa Huffnagle was working as a cashier at the 11th and Chestnut Streets store in the fall of 1985. She was friendly with Robert Cressman and in November or December went to see him at the Frankford Avenue store. While there she ran into Segal who asked her what she thought of the Union. Huffnagle was afraid for her job and said nothing. Segal then asked what he could do for her, adding that he would give her a "little bit more" money if the Union did not get in. Emboldened by this, Huffnagle asked about medical benefits. Segal said no, but repeated that he would give her more money. Segal told her that he didn't want the Union in because he would "have bosses over top of him." At this point in the conversation Lieberman came up to where Segal and Huffnagle were talking. Segal then said that the stores would close if the Union got in, that they would sell the stores one by one to Koreans. Huffnagle later saw a person she described as a Korean at the store with Segal, and later with Lieberman. She stated that she had never seen Koreans in that store before.

Huffnagle also testified that Jim Giordano, the manager of the 11th and Chestnut store in the fall of 1985, told her that if the Union got in the stores would close immediately.

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7. Erroneously referred to in the transcript as "Sue" Parker.

Segal testified that he believed he had met with Lisa Huffnagle, but that "that one is a little vague to me." Lieberman did recall that Huffnagle mentioned problems at 11th Street but he was also very vague and general about what was said in his talk with Huffnagle. He did say that she had asked for more money but he and Segal told him they couldn't give anyone raises at that time.

Giordano, an admitted supervisor, did not testify at all.

Arlene Tolliver is a cashier at the 8th and Chestnut Street store. About a month before she was to mail in her ballot, she was working at the Chelton Avenue store and, testified that Jack Segal approached her in the back room of that store. Segal began by asking Tolliver if she had "any gripes." This apparently was repeated, and finally Tolliver told Segal that she was not happy with the fact that she had not received a raise for a year and a half. Segal said he was sorry and, that he would see what he could do after the Union vote. Nothing could be done right then. He also said that he would close the stores down if the Union got in.

Segal not only did not deny these statements attributed to him, but added that at that meeting Tolliver asked for, and was granted, a day off on Dr. Martin Luther King's birthday, which happened to be the same day as her own birthday.

Francine Wilson is a cashier at 11th and Chestnut and was employed at 8th and Chestnut at the time of the Union campaign late in 1985. She had attended Union meetings and had assisted in the processing of employee authorization cards. In November 1985, Segal talked to her in the back room of the 816 Chestnut Street store. He said that he had heard Wilson was the secretary for the Union, adding that he would "hate to lose" her, but he would not hold that over her head. He also told Wilson that he had his own business for so long that he couldn't afford to "let somebody else come in" and he would be forced to sell the stores one by one. Wilson also testified that her manager had previously recommended her for a raise, and that Segal had approved it, but when he came to talk to her in the back room he said that he couldn't give it

then, but would get it after the election was over. She did receive a raise in January, 1986, after the election.[8]

In addition to this, there was some conversation about how good Segal had been to Wilson's mother and cousin, giving them jobs and protecting them in those jobs. In fact, as Segal pointed out in his testimony, Wilson changed in the course of that conversation, telling him that she no longer wanted the Union, and that she would inform the employees at the 11th and Chestnut store of this conversation.

John De Marco was employed at the Company's Sharon Hill store from September 1985 to October 1986. He testified that he had signed a card which was given him by Ralph Atwell. About 3 weeks before the election Lieberman called De Marco into the back room at the Sharon Hill store. De Marco's testimony came out a bit garbled in the transcript, but I think it is fair to say from what does appear there, and from my memory of De Marco's testimony, that Lieberman told him that things would get better if the Union lost, and that he was going to sell the store to Koreans if the Union won. Whatever Lieberman said about "improvements" in conditions at the store De Marco was foggy on the details, but concluded that whatever was said "was really nice, it was great." Lieberman was not asked about this conversation.

Two other employees, Ralph Atwell and Karen Andrews, were named in the Complaint as having suffered discriminatory treatment, but they also testified concerning actions which come within the allegations in this section of the decision.

Atwell worked in the Company's warehouse at 4530 Tacony Street from May, 1984 to February 1986. His duties involved driving the Company's van or truck making deliveries to the stores scattered around the Philadelphia area, and to Sharon Hill and Allentown. Atwell also acted as courier for the Union during the campaign, passing out and picking up

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8. Wilson had been employed since 1983, and had received a raise every year. Segal agreed that she was clever, a good employee, and had received four raises up to 1986.

cards at the stores. He hosted a Union meeting at his house which was attended by "quite a few" employees. He testified that Segal approached him one day after he got involved with the Union, and said he had heard a rumor that Atwell was a "ringleader" in the Union. Segal asked Atwell why he hadn't come and told him. Atwell replied that Segal wouldn't have believed him anyhow.[9]

Karen Andrews was hired by Amazing Stores on 16 October 1985, and worked through 31 December of that same year at the Frankford Avenue store. Robert Cressman gave her a Union authorization card, which she signed and returned, and she attended at least one Union meeting. At the beginning of December Lieberman called her into the back room of the store, and he asked her about the Union. She said that she had attended a meeting and Lieberman replied that he knew she was there, it didn't matter who told him[10] but he knew she was at a meeting. Lieberman told Andrews how good he had been to employees, granting raises and days off, and stated that if the Union got in they would probably sell the stores—if they had to pay benefits and higher wages prices would go up and they would lose business. If the Union did not get in they were going to revamp all the Stores, and were going to get rid of the people who weren't doing their jobs.

When asked about who Lieberman said he was going to sell the stores to, Andrews quoted him as saying he already had a "Korean guy" coming in, looking at the stores, and if the Korean people got in, they would eventually bring their families in and the current employees would all be let go.

Segal then joined them and asked Andrews what the Union had offered her. She said the Union just offered information, and she continued to describe Segal's comments, quoting him as saying that the stores were his livelihood, and if the Union got in it wouldn't be worth it to him (to continue the business).

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9. Atwell's further dealings with the Company will be related in Section III E. 1, below.

10. From Lieberman's testimony it appears that Cressman told him that Andrews was at a Union meeting.

The testimony of Andrews on this meeting was not denied either by Segal or Lieberman.

I have already found that the testimony of the General Counsel's witnesses was generally credible. In dealing with this section of the Complaint, I found that General Counsel's witnesses to be entirely credible. Moreover, this substantive testimony was either corroborated or undenied in all respects by the testimony of Lieberman and Segal. The latter two made it obvious that they were acting in concert, that they made every effort to carry their message to all of the employees, that their primary message was if the Union was to win the election the stores would be closed, or sold to Koreans, that the Koreans would hire their family members to staff the stores, and that whether the stores were closed or sold, the employees would lose their jobs. Segal was candid in admitting that he went to a Korean broker and arranged for a Korean potential buyer to be escorted around to some of the stores.[11] I conclude, in view of these facts, that Segal and Lieberman talked to almost all of the employees of all the Amazing Stores, causing widespread concern shared jointly by all the employees and expressed in considerable discussion among themselves. The testimony of Huffnagle, Wilson, Andrews and Cressman, shows that these employees were apprehensive about their jobs. These were not throw-away jobs for these people, but were the employees' means of survival. The employees' fears were exacerbated by the actions of Segal and Lieberman in walking through the stores with Koreans or other oriental persons, who could be taken to be prospective buyers. An additional allegation noted that admitted supervisor James Giordano told employee Lisa Huffnagle that the stores would be closed if the Union won the election. I find

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11. I cannot say that this was not legitimate insofar as the prospective buyer was concerned. I am not so sure about Segal's motivation in soliciting such potential purchases. Whatever the motive, I find that the appearance of the Korean in the stores served to emphasize and dramatize the threats to sell or close the stores. The fact that the matter was dropped after the elections shows that the whole idea of a sale was calculated to frighten and intimidate the employees.

that this occurred as related by Huffnagle. Giordano did not testify. I find these activities by Respondent violated Section 8(a)(1) of the Act. *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575 (1969); *Seal Trucking Limited*, 237 NLRB 1091.

I find, further, that Respondent unlawfully gave the impression to its employees that their activities on behalf of the Union were under surveillance. This is alleged in the complaint with respect to Lieberman's remarks to Karen Andrews that he knew she had attended a Union meeting, and that it didn't matter who told him, but he knew it. This necessarily had a coercive effect an employee union activity, and violated Section 8(a)(1) of the Act. *Edward A. Utlaut Foundation, Inc.*, 249 NLRB 1153; *Brodart, Inc.*, 257 NLRB 380.[12]

Respondent violated the law through Lieberman's questions to Karen Andrews about her knowledge of the Union campaign, and to Lisa Huffnagle on what she thought about the Union. In the circumstances of these interrogations, conducted by the Company's highest officials in intimidating circumstances in back rooms with no other employees present the qualifications noted in *Rossmore House*[13] do not apply; *Robbins Federal Credit Union*, 273 NLRB No. 1352.

With respect to allegations in the Complaint concerning promises of benefits by the Respondent to employees if the Union did not win the election, I find that Jack Segal told Marlo Jackson that the employees would get raises if they rejected the Union; Lieberman and Segal promised Francys Cotto that "things would get better" if they did not have a Union; and Lieberman's promise of "more money" and unspecified "approvements" to employees John De Marco. All of these incidents constitute violations of Section 8(a)(1) of the Act. *Baker Mfg. Co., Inc.*, 218 NLRB 1295; *Martin City Ready Mix*, 264 NLRB 450.

The Complaint also alleged that the Respondent, through the activities of Lieberman, or Segal, or both, had solicited

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12. Segal made similar remarks to Francine Wilson and Ralph Atwell, but these incidents were not alleged as violations in the Complaint.

13. 269 NLRB 1176.

grievances from an employee (Segal), threatened an employee with less favorable benefits and working conditions (Lieberman and Segal); and threatened to delay, and in fact did delay, the payment of employee Christmas bonuses (Lieberman and Segal). Arlene Tolliver testified that Segal repeatedly asked her if she had any grievances at their meeting in the stock room of the Chelten Avenue store. When she complained that she could not take off on Martin Luther King's birthday, Segal replied that he did not see why she could not have the day off. He also indicated that he would see about a raise for her as soon as the "Union thing" was settled. I find this solicitation of grievance to violate Section 8(a)(1). *Rexair, Inc.*, 243 NLRB 876.

The allegation dealing with alleged threats to reduce benefits stems, according to the General Counsel's brief, from the conversation between Segal, Lieberman and Karen Andrews in the stockroom of the Frankford Avenue store. Lieberman pointed out to Andrews in that meeting that the Company had accommodated Andrews' schedule and had given her raises. The implication is obvious. If she continued to support the Union, then those privileges would be withdrawn. I find this, too, to be a violation of Section 8(a)(1). *Rosewood Mfg. Co.*, 269 NLRB 782.

There is no question here that the Company had, for at least 2 years prior to 1985, distributed a Christmas bonus to employees just before that holiday. In 1985, however, Lisa Huffnagle testified that Lieberman and Segal told her that the employees would not receive bonuses because that would appear to be a "bribe." Francine Wilson testified that she was told by her manager that the reason for the delay in giving bonuses was the employees' union activities. In fact bonuses were given, but were not distributed until New Year's Eve, 31 December 1985. The election was conducted by mail ballot on between 10 and 30 December 1985, and the ballots were counted on 16 January 1986. It thus appears from the credible testimony of Huffnagle and Wilson, undenied by Respondent's witnesses, that the bonuses were delayed because of the employees' participation in the election process being

conducted under the auspices of the Board. The threat to take this action, and the action itself are separate violations of Section 8(a)(1) of the Act; *Franklin Parish Broadcasting, Inc.*, 222 NLRB 1133; *National Micronetics, Inc.*, 277 NLRB No. 95.

As I have noted, above, I do not consider the testimony of Roger Parker to be reliable. I therefore cannot find that his testimony about Lieberman's alleged request to employees to bring their ballots in to him and, he would mail them to the Board, to be credible. Nor do I find that statements alleged by Parker to have been made by supervisor Sarah Block are reliable enough to base a finding thereon.

E. Alleged Violations of Section 8(a)(3)

1. Ralph Atwell

As described above, Respondent became aware of Atwell's Union activity early in the campaign. Segal had confronted him with the accusation that he was the ringleader of the Union activity. Atwell was not the person who brought the Union into contact with the Company's employees. That person was Steve Calhoun. But Atwell was highly visible in his support from the Union and acted as a courier between Union adherents in the scattered stores.

In December of 1985 the Company, presumably through the decisions of Lieberman and Segal determined that Atwell would not be given a Christmas bonus. This decision was made allegedly because of Atwell's poor work performance. Segal claimed in his testimony that he warned Atwell about his work performance late in December. Segal said he called three employees to witness his conversation with Atwell, but none of these "witnesses" were called upon to testify in this case. Atwell denied that the incident took place, and I credit his testimony in this regard. The remaining testimony by Segal concerning Atwell reflects, in my opinion, that Segal resented the fact that Atwell's job took him around to the stores where he could and did talk about the Union to the employees. There is no substantial evidence that Atwell dis-

rupted work in the store, or otherwise did not perform in a satisfactory manner.

In addition to its denial of a Christmas bonus to Atwell, the Company also denied him a pay increase when it reviewed its employees' wages in January of 1986. The same reasons were advanced for this as for the denial of the Christmas bonus.

There being no legitimate or credible business justification for these actions, I find that Respondent violated Section 8(a)(1) and (3) in denying Atwell a Christmas bonus in 1985, and a pay increase in 1986.

2. Gail Davis

Davis began working for Lieberman and Segal at another store owned by them, called Top Banana, in 1981. In 1983 she moved to the Amazing store at 1124 Chestnut Street. She remained at this last location throughout the Union campaign.

In early December, her manager, Jim Giordano, told her that Segal was in the back room and wanted to talk to her. She asked if she had to. Giordano said no, so Davis said she didn't want to go back there. According to Davis everyone else in the store went to the back room to talk to Segal except Steve Calhoun and herself. Calhoun later did talk to Segal about the Union.

On New Year's Eve, 1985, Lieberman and Segal came to the 1124 Chestnut Street store about 2:30 or 3:00 in the afternoon. Davis and Lisa Huffnagle were both working on separate cash registers, although both testified that it was not busy that afternoon.[14] All of the employees who were in the store that day were called to the back room and received a bonus with the exception of Gail Davis. After Lieberman and Segal had left Davis called Manager Jim Giordano over and asked about her Christmas bonus. Giordano replied that she would not go back to see Lieberman and Segal when they

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14. Bruce Kraskow testified that he was a relief cashier at the 1124 Chestnut Street Store, but that he was not called upon to fill in on that day.

wanted to talk to her, so she was to get no bonus. This last was corroborated by Lisa Huffnagle. Giordano did not testify. Segal and Lieberman averred that they did have a bonus for Davis, but the store was so busy that she could not be relieved at the time they were there. They stated that they went to another store further west on Chestnut, then returned later to find that Davis had already left.[15]

In the meantime, after Giordano told her that she would not be receiving a bonus. Davis told Giordano that she was leaving early. She was upset and in response to Huffnagle's request that she give her a call, replied "what for?", and when Huffnagle asked her if she was coming back, again said "what for?" Davis was not so angry that she did not wish everyone a happy New Year before she left. Notwithstanding the strained circumstances of her departure. Davis testified, credibly, that she told Giordano that she was leaving, she did not say that she was quitting, and that Giordano did not say anything to her, merely shrugging his shoulders. The next working day, 2 January, 1986, according to Davis, she called Giordano and told him that she would not be in that day. This was the normal procedure for employees who were taking a day off. Giordano said "O.K." Later that day, however, Giordano called Davis on the telephone and said "Gail, you are being replaced." She asked if she was being fired and Giordano replied, "no, you quit." Davis later went to the Company's office to pick up her check. While she was there she asked Lieberman why she was fired. He said she had quit, but she was given no opportunity to return to the 1124 Chestnut store, or to be reassigned some where else. Nor was she given the bonus check which Segal and Lieberman testified they had not been able to give her on 31 December, at Chestnut Street.

On the bonus check, I think the record is clear that Segal and Lieberman had no intention of giving the check to Davis when they visited the 1124 Chestnut Store on 31 December.

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15. They did not attempt to explain why they did not make arrangements to pay the bonus to Davis, or even to send it to her if, as they maintained, she had quit.

There is no question that the store was not busy. Huffnagle, the other cashier, was relieved to get her check. Kraskow, the relief cashier was not called to relieve Huffnagle. There is not testimony to corroborate the testimony of Segal and Lieberman that they returned to the store later that evening. In fact both Huffnagle and Kraskow testified that they did not return. Davis's testimony that Giordano told her that she did not get a bonus check because she had refused to talk to Segal and Lieberman earlier, during the Union campaign, is both credible and undenied. I find, in these circumstances, that Davis was denied her bonus because of her refusal to meet with her employers, a clear violation of her right to engage in protected activity on behalf of the Union in violation of Section 8(a)(1) and (3) of the Act.

The next question is whether Davis' leaving of the store on the afternoon of 31 December, constituted a resignation from her employment. I think not. Davis testified, again credibly, that she told Giordano that she was leaving. She had been publicly humiliated by not receiving a check and, Giordano's explanation of why she had not been paid the bonus had been overheard at least by Huffnagle. Giordano's reply was a noncommittal shrug. He did not say she could not or should not go. There is no indication in this record that punching out early was an offense against Company rules or policies. At that point, despite what Davis may have said to Huffnagle, even in the presence of Giordano, Davis had not indicated to any responsible Company official that she was not coming back. In any event, any ambiguity left in the atmosphere of New Year's Eve, should have been clarified for the Company when Davis talked to Giordano on the morning of the next working day 2 January 1986. She told him that she would not be in that day and he agreed with that statement, saying "o.k.."

We do not know what happened after that morning telephone call, but the next thing that Davis knew, Giordano called her at 4 or 4:30 on the afternoon of the second and told her she had been replaced. The only logical explanation for this is that a decision was made, I infer and find it was made by Lieberman and Segal, to use Davis' angry departure on

New Year's Eve as an excuse to get rid of her. This, I find, follows logically from the refusal to pay this troublesome and uncooperative employee a bonus, and her natural irritation at being told that the reason for the refusal to pay the bonus was her exercise of her rights under Section 7 of the Act, to refrain from meeting with Segal and Lieberman. In these circumstances, I find that Davis was, in fact, discharged in further retaliation for her exercise of statutorily protected rights.

3. Karen Andrews

Andrews was hired on 6 October 1986, as a cashier in the Frankford Avenue Store. She maintained that she was hired as a permanent, not a seasonal, employee. Robert Cressman testified that he had suggested to Lieberman in the fall that they needed another person at Frankford Avenue for holiday work. Andrews was hired after that, but there does not seem to be a connection between Cressman's recommendation and Andrews' hiring. In any event, she was hired by store manager Ellen Nancy Faragasso. Lieberman indicated at one point in his testimony that Andrews was a "seasonal" employee, and at another point he was not so clear about her status, fending off questions about her absenteeism and job performance by saying that at that time they needed all the hours she could give them.[16]

It is accurate to say that Andrews was not the most faithful of workers. She had a problem in that she had to drop her little boy off at school at about the time she was scheduled to report for work making her, by her own admission, 10 minutes or so late every morning.[17] Beyond this chronic tardiness, Andrews was marked as being sick for at least one day

16. Faragasso also testified that Andrews was hired as a seasonal employee, and that she was warned constantly about lateness and absenteeism.

17. Two time cards submitted in evidence by the Respondent shows that this statement was substantially accurate, although the cards do not bear out Andrews' assertion that she worked eight hours a day, six days a week; rather they show her working only three days in each of the two weeks covered.

in November, according to the two time cards in evidence. She was described by Faragasso as being sick at other times and not calling in. Andrews also obtained another job in December. This was a day time waitress position at a local restaurant on Thursdays and Fridays. She testified that she had to begin as a day employee at the restaurant in order to work her way on to the night shift. She was moved to nights at the restaurant in January.

Meanwhile, after Christmas, Andrews noted that she was scheduled for only one day in the following week. She asked Lieberman about this and he replied that he was having a hard time finding hours for her. He did say that he would try to find some hours, and asked her if she would work at other stores. She said she would. However, on the next day, 31 December, Lieberman called Andrews and told her he couldn't find any hours for her and had to lay her off. When she protested he said there was nothing he could do for her when she was coming in late all the time and missing days.

Aside from Lieberman's answer to one question on the layoff of Andrews, the position of the Company is consistent, through the testimony of Faragasso and Cressman who I found to be credible witnesses, that Andrews was hired as a seasonal employee. The season ended right after the holidays, and she was laid off. I do not believe that the General Counsel has established a *prima face* case that this layoff was motivated by any reasons other than the seasonal nature of Andrews' employment, and her admitted tardiness and poor attendance. Therefore, I do not find a violation of Section 8(a)(1) and (3) in the Andrews layoff.

F. The Alleged Refusal to Bargain

I have already found, based on the arithmetical figures represented by the names of employees agreed upon by the parties, and by my findings regarding Andrews, Barseghian and Siers in section III A, above, the Union held authorization cards for a majority of the employees from 7 November through 15 November 1985.

On 15 November the Union made a valid demand for

recognition based on this majority. The Company refused to recognize the Union, instead it began what I find to be a calculated plan of coercion and intimidation orchestrated and implemented by Joseph Lieberman and Jack Segal, through individual meetings with all but one of the Company's employees. The centerpiece of the campaign was the constantly repeated assertion by Lieberman or Segal or both in these meetings where they each applied pressure to the unaccompanied, sometimes frightened, individuals by means of threats that the stores were going to be closed or sold to Koreans who, in turn, would hire their own relatives and discharge the current employees. The threats uttered at the individual meetings were given additional substance by appearances of Lieberman and Segal accompanied by one or more oriental persons, a theatrical device I have found to have been staged by Segal in order to heighten the employees' anxieties.

The critical points which I discerned in all this were, of course, the coercive impact of the threats and the appearances of the Koreans; the other unfair labor practices I have found, the interrogations, promises of improved conditions, denial of bonuses, giving the impression of surveillance; but the fact that both Segal and Lieberman not only admitted that they had threatened employees that they would close or sell the stores, but the fact, from my observation of both Lieberman and Segal while they were testifying, that they meant exactly which they were saying, and that if the Union had won the election they would have sold off the stores, to Koreans, or anybody, and rid themselves of any obligation to bargain collectively with the Union chosen by their employees. Moreover, I discerned not one iota of regret or remorse that they had done these things. I have no doubt that if, as the result of my recommendations in this case, a second election were to be ordered, Lieberman and Segal would find the means to let their employees know that their joint will is unchanged and that the advent of the Union would mean the end of their connection with Amazing Stores.

It is for this last reason, more than the other unfair labor

practices, even the mistreatment of Ralph Atwell and the discharge of Gail Davis, that I feel that the ordinary remedies of notice posting, cease and desist, and a new election would not properly protect the rights of the employees here so egregiously disregarded, and that a bargaining order, as requested by the General Counsel, would be the most appropriate remedy.[18] I therefore find that the Respondent has failed to bargain in good faith with the majority representative of its employees in the unit stipulated to by the parties in violation of Section 8(a)(1) and (5) of the Act. *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575; *Precision Graphics, Inc.*, 256 NLRB 381; *Abdul Samad, et al d/b/a Michigan Expediting Service*, 282 NLRB No. 30.

G. The Objections

In view of my disposition of the unfair labor practice portion of this case, see section III F., above, I recommend that the objections to the election herein be dismissed.

IV. THE REMEDY

Having found that the Respondent has violated Section 8(a)(1), (3) and (5) of the Act, I shall recommend that it cease and desist therefrom and that it take the following affirmative action designed to effectuate the policies of the Act. I will recommend that the Respondent offer to Gail Davis immediate reinstatement to her former position, or if that position no longer exists, to a substantially equivalent position without prejudice to her seniority or other rights and privileges which she had enjoyed and that she be made whole for any loss of earnings suffered by her as a result of the discrimination against her by the payment of sums equal to those she would have earned, absent such discrimination, with backpay computed in accordance with the formula in *F.W. Woolworth Company*, 90 NLRB 289 (1950), and with interest com-

18. Indeed, I feel that the possibility of the closing or sale of stores is so real a risk that I am recommending a broad order here to put whatever emphasis I can on the danger of disregard and nullification of the effect of this decision by the Respondent; *Hickmott Foods*, 242 NLRB 1357.

pounded in the manner described in *Florida Steel Corporation*, 231 NLRB 651 (1977).

I will recommend that the Respondent pay to Gail Davis and to Ralph Atwell sums equivalent to the bonuses which were unlawfully denied them in December 1985, and to Atwell a sum equal to any pay increase he would have been awarded in January 1986, to the time of his voluntary termination from employment with Respondent together with interest thereon.

I will recommend that the Respondent upon request bargain in good faith with the Union as the representative of its employees in the unit heretofore found to be appropriate, concerning wages, hours and other conditions of employment for the employees in said unit.

Since the unfair labor practices found here are egregious and widespread, going to the heart of the Act and vitally affecting the livelihood of employees, I shall recommend that a broad order issue in this matter; *Hickmott Foods, Inc., supra*, and I shall grant the General Counsel's request for a remedial visitorial provision.

Since there is a real possibility that Respondent will sell one or more of its retail stores in order to frustrate its employees' wishes, or this recommended order, I shall recommend that it be ordered not to discontinue its operations, at any of its locations.

CONCLUSIONS OF LAW

1. The Respondent, Amazing Stores, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

(2) United Food and Commercial Workers, Local 1357, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

(3) The following employees of Respondent constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 8(b) of the Act:

All full-time and regular part-time sales personnel, stock

personnel, cashiers and truck drivers employed by the Employer at its 816 Chestnut St., 1124 Chestnut St., 1621 Chestnut St., 7130 Frankford Ave., 5645 N. 5th St., Academy Plaza, Academy & Red Lion Rds, and 139 W. Chelten Ave., Philadelphia, PA., locations, and its Sharon Hill Plaza, Chester Pike, Sharon Hill, PA., 734 Hamilton St., Allentown, PA., locations, excluding all their employees, guards and supervisors as defined in the Act.

4. By interrogating its employees, by giving them the impression their protected activities were under surveillance, by promising them benefits, coercing and threatening them in order to interfere with their right to choose a representative of collective bargaining, the Respondent has violated Section 8(a)(1) of the Act.

5. By threatening to withhold employees' bonuses and by withholding those bonuses for a period of 1 week, the Respondent has violated Section 8(a)(1) of the Act.

6. By failing and refusing to pay bonuses and pay increases to Gail Davis and Ralph Atwell, the Respondent has violated Section 8(a)(1) and (3) of the Act.

7. By discharging Gail Davis, the Respondent has violated Section 8(a)(1) and (3) of the Act.

8. By refusing to bargain collectively and in good faith with the Union, in the unit set out above, the Respondent has violated Section 8(a)(1) and (5) of the Act.

9. The unfair labor practices set forth above affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the basis of the foregoing findings of fact, conclusions of law and upon the entire record in this proceeding, and pursuant to the provision of Section 10(c) of the Act, I hereby issue the following, recommended:

ORDER

The Respondent, Amazing Stores, Inc., its officers, agents, successors and assigns, shall:[19]

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19. In the event no exceptions are filed as provided in Section 102.46

1. Cease and desist from:

(a) Interrogating its employees; giving its employees the impression that their protected activities are under surveillance; threatening its employees with the closure or sale of its stores; promising increased benefits to its employees or coercing or threatening them, in order to interfere with their rights to choose a collective bargaining representative.

(b) Threatening to discontinue its operations or to sell its Stores, or discontinuing its operations or selling its stores to retaliate against its employees on account of their activities on behalf of the Union.

(c) Terminating any of its employees on account of their Union activity.

(d) Refusing to pay bonuses or pay raises on account of employees' Union activity.

(e) Refusing to bargain in good faith with the Union over wages, bonuses and conditions of employment for its employees.

(f) In any manner interfering with, restraining or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Recognize and upon request bargain collectively and in good faith with the Union as the exclusive bargaining representative of its employees in the appropriate bargaining unit described as follows:

> All full-time and regular part-time sales personnel, stock personnel, cashier and truck drivers employed by the Employer at its 816 Chestnut St., 1124 Chestnut St., 1621 Chestnut St., 7130 Frankford Ave., Philadelphia, PA. locations, and its Sharon Hill Plaza, Chester Pike,

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of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

Sharon Hill, PA., 734 Hamilton St., Allentown, PA. locations, excluding all other employees, guards and supervisors as defined in the Act.

(b) Pay to Gail Davis and Ralph Atwell the bonuses unlawfully withheld from them in December of 1985, together with interest thereon.

(c) Pay to Ralph Atwell the raise in pay unlawfully withheld from him in January of 1986, together with interest thereon.

(d) Offer to Gail Davis immediate and full reinstatement to her former or substantially equivalent position, together with backpay to which she may be entitled, because of its discrimination against her, together with interest thereon.

(e) Post at its facility in Philadelphia, Pennsylvania, copies of the attached notice marked "Appendix."[20] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 4, in writing, within 20 days from the date of this Order, what steps have been taken to comply therewith. For the purpose of determining or securing compliance with this Order, the Board, or any of its duly authorized representatives, may obtain discovery from the Respondent, its officers, agents, successors or assigns, or any other person having knowledge concerning any compliance matter, in the manner provided

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20. In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

by the Federal Rules of Civil Procedure. Such discovery shall be conducted under the supervision of the United States Court of Appeals enforcing this Order and may be had upon any matter reasonably related to compliance with this order, as enforced by the Court.

Dated, Washington, D.C. 27 July 1987

George F. McInerny
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a trial at which all parties had the opportunity to be heard, we have been found to have violated the National Labor Relations Act, as amended, and we have been ordered to post this notice.

The Act gives employees the following rights:

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

Accordingly we give you these assurances:

WE WILL NOT interrogate our employees concerning their Union activities, nor give them the impression that their Union activities are under our surveillance, nor threaten our employees with closure or sale of our stores, nor promise increased benefits to our employees or threaten to take away their benefits, because they have engaged in Union activities.

WE WILL NOT discontinue our operations at any location in retaliation for our employees' activities on behalf of the Union or any other labor organization.

WE WILL NOT terminate any of our employees nor deprive them of bonuses or pay raises to which they are entitled because of their activities on behalf of the Union or any other labor organization.

WE WILL NOT in any manner interfere with, restrain or coerce our employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL recognize and bargain collectively with the Union, in good faith.

WE WILL offer Gail Davis immediate and full reinstatement and we will pay her for any loss of earnings or benefits suffered by her because of our discrimination against her, and WE WILL compensate Gail Davis and Ralph Atwell for our failure to pay them moneys to which they are entitled.

AMAZING STORES, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any question concerning this notice or compliance with its provisions may be directed to the Board's Office, 1 Independence Mall, 7th Floor, 615 Chestnut Street, Philadelphia, PA 19106, Telephone No. 215-597-7643.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION

AMAZING STORES, INC.,	:	
	:	
Employer,	:	
	:	Cases 4-CA-15602
and	:	
	:	4-CA-15683
UNITED FOOD AND	:	
COMMERCIAL WORKERS,	:	4-RC-16096
LOCAL 1357, AFL-CIO.	:	
	:	
Charging Party and Petitioner.	:	

MOTION TO REOPEN THE HEARING

Respondent, Amazing Stores, Inc., by and through its attorneys, hereby moves the National Labor Relations Board ("NLRB") under NLRB Rules and Regulations § 102.48(d)(1) for an order directing that the record in the instant matter be reopened to permit Respondent to adduce previously unavailable evidence. The evidence Respondent seeks to adduce would show that, since the close of the hearing held in this matter in November of 1986, the percentage of turnover among employees who were members of the bargaining unit at the time of the December 1985 election increased from a figure of more than fifty percent (at or about the time of the hearing) to a present figure of approximately ninety-five percent. This evidence is germane to and should affect the result of pending issues, for the reasons stated in the accompanying Memorandum of Law and supporting Affidavit, which are incorporated by reference herein.

Laurance E. Baccini
David W. Wolf
Attorneys for Respondent
Amazing Stores, Inc.

SCHNADER, HARRISON, SEGAL & LEWIS
1600 Market Street, Suite 3600
Philadelphia, Pennsylvania 19103

Of Counsel.

Dated: March 3, 1988

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
FOURTH REGION

AMAZING STORES, INC.,	:	
	:	
Employer,	:	
	:	Cases 4-CA-15602
and	:	
	:	4-CA-15683
UNITED FOOD AND	:	
COMMERCIAL WORKERS,	:	4-RC-16096
LOCAL 1357, AFL-CIO.	:	
	:	
Charging Party and Petitioner.	:	

MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT'S MOTION TO REOPEN THE RECORD

INTRODUCTION

Respondent, Amazing Stores, Inc., seeks to have the hearing in this matter reopened for the limited purpose of receiving testimony concerning relevant events which occurred after the close of the hearing in November of 1986.

An issue in this litigation concerns the propriety of a *Gissel* bargaining order recommended by the Administrative Law Judge ("ALJ"). Respondent has filed an Exception with the National Labor Relations Board ("NLRB" or "Board") to that part of the ALJ's decision. *See* Exceptions of Respondent to the Decision of the Administrative Law Judge, Exception No. 7. Some testimony was adduced at the hearing in this matter before the ALJ with respect to the degree of employee turnover among Respondent's employees since the time of the election. *See* Transcript of Hearing, pp. 395-397. During the period of time which has elapsed since the close of the hear-

ing, however, the turnover rate among these employers has increased to approximately ninety-five percent. *See* Affidavit of Jack Segal at ¶ 4, attached hereto as Exhibit "A" ("Segal Affidavit"). This calculation excludes the terminations of employees Davis and Andrews, which were the subject of unfair labor practice charge allegations.

Respondent submits that evidence concerning the degree of employee turnover among Respondent's employees is highly relevant to the issue of the propriety of the ALJ's recommended *Gissel* bargaining order. In light of the importance of this issue and the posture of the instant case, the development of this highly relevant evidence after the close of the hearing warrants reopening the hearing to place testimony and evidence on the record for this limited purpose.

ARGUMENT

Section 102.35(h) of the National Labor Relations Board Rules and Regulations empowers an ALJ to reopen a hearing upon motion, or where the circumstances warrant, *sua sponte*. *See Local Union No. 3, Electrical Workers and L. M. Ericsson Telecommunications, Inc.*, 257 NLRB 1358, 1362 n.11 (1981) (ALJ had authority to reopen hearing *sua sponte* to receive testimony of witness previously considered unavailable where reopening was timely, no party was prejudiced thereby and interests of justice were served). NLRB Rules and Regulations § 102.48(d)(1) further provides that after a case has been transferred to the Board, a party may move to reopen the hearing to adduce "newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing..." Section 102.48(d)(1) requires the moving party to state why the evidence "was not presented previously; and that if adduced and credited, it would require a different result." *See Local Union No. 3, Electrical Workers, supra. See also NLRB v. Lloyd Wood Coal Co., Inc.*, 585 F.2d 752, 757 (5th Cir. 1978) (Board abused discretion when it

refused to reopen record to receive previously unavailable and highly relevant evidence).

The circumstances of the instant case clearly warrant reopening the hearing for the limited purpose of placing evidence on the record concerning the extremely high percentage rate of employee turnover following the close of the hearing in this matter. *See* Segal Affidavit, ¶¶ 3, 4. This evidence is highly relevant to the issue of whether a *Gissel* bargaining order is appropriate. *See, e.g., Marchese Metal,* 270 NLRB 293 (1984); *Regency Manor Nursing Home,* 275 NLRB 1261 (1985). Because the increased rate of turnover since the close of the hearing strongly militates against the issuance of a *Gissel* bargaining order, *see* Respondent's Brief in Support of Exceptions to the Decision of the Administrative Law Judge (pp. 38-40), this evidence, if credited, should require the denial of the ALJ's recommended *Gissel* order. That some evidence was introduced during the hearing on this issue further underscores and magnifies the relevance and importance of placing complete evidence on the record of employee turnover subsequent to the close of the hearing. In short, because of the immediate relevance of this evidence of employee turnover to the *Gissel* bargaining order issue in this case, it would be prejudicial to both Respondent and the interests of justice to deny Respondent an opportunity to place this evidence before the Board for the Board's due consideration.

CONCLUSION

For reasons stated herein, Respondent Amazing Stores, Inc. respectfully requests that the hearing in this matter be reopened for the limited purpose of placing on the record the evidence proffered herein.

Respectfully submitted

_____

Laurance E. Baccini

David W. Wolf
Attorneys for Respondent
Amazing Stores, Inc.

SCHNADER, HARRISON, SEGAL & LEWIS
1600 Market Street, Suite 3600
Philadelphia, Pennsylvania 19103

Of Counsel

Dated: March 3, 1988

COMMONWEALTH OF :
PENNSYLVANIA : ss
COUNTY OF PHILADELPHIA :

AFFIDAVIT

Jack Segal, being first duly sworn, deposes and says:

1. That I am President of Respondent Amazing Stores, Inc. and am authorized to make this affidavit in that capacity.

2. I have reviewed both the current payroll records of Amazing Stores, Inc. and the names of employees set forth on Joint Exhibit 1, which shows employees employed by Amazing Stores, Inc., at the time of the election period in December of 1985.

3. Of the 36 employees who are shown on Joint Exhibit 1 as being on respondent's payroll in December of 1985 and eligible to vote in the election held at that time (including employees Barseghian and Siers but excluding employees Andrews and Davis), only 2 employees are still employed by Amazing Stores, Inc. They are Ellen Faragasso and Peggy Russo.

4. Thus, only five percent of the 36 above-described employees who were employed by Respondent and eligible to vote in December of 1985 are employed by Amazing Stores as of the date of this affidavit.

_____
Jack Segal

Sworn to and subscribed before
me this 3rd day of March, 1988.

_____
NOTARY PUBLIC

My Commission expires:

COMMONWEALTH OF :
PENNSYLVANIA : ss
COUNTY OF PHILADELPHIA :

AFFIDAVIT OF SERVICE

David W. Wolf, being duly sworn, deposes and says that:

1. I am an attorney for Amazing Stores, Inc., the respondent in this action.

2. On March 3, 1988, I served a true and correct copy of the foregoing Motion to Reopen the Record by first-class mail, postage prepaid, by placing the same in a United States postal depository addressed to the following:

Susan Stahl, Esquire
Henry Protas, Esquire
National Labor Relations Board
Region Four
One Independence Mall, 7th Floor
Philadelphia, Pennsylvania 19106

Peter V. Marks, Esquire
Kirschner, Walters & Willig
1608 Walnut Street, 10th Floor
Philadelphia, Pennsylvania 19103

3. I understand that the foregoing statements are made subject to the penalties of 18 Pa. C.S.A. §4904 relating to unsworn falsification to authorities.

_____
David W. Wolf

Dated: Mareh 3, 1988

United States Court of Appeals

District of Columbia Circuit
Washington, D.C. 20001-2866

CONSTANCE L. DUPRÉ
CLERK

GENERAL INFORMATION
(202) 535-3300

October 20, 1989

RE: 88-1693, Amazing Stores, Inc., v. National Labor Relations Board

Dear Counsel:

Enclosed are three copies of the opinion in the above entitled case.

Please note that the judgment has been entered on the same date as the opinion and is for mandate purposes only.

Sincerely,

Janice Irving
Deputy Clerk

Enclosures

DISTRIBUTION: Thomas Earl Patton
Lawrance E. Baccini
Aileen A. Armstrong

No. 88-1693

In the
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1989

AMAZING STORES, INC.,

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

ORDER

It is ORDERED, *sua sponte*, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. R. 15 (August 1, 1987). This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

For The Court

Constance L. Dupré
Clerk

Supreme Court, U.S.
FILED
FEB 16 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1190

In the Supreme Court of the United States

OCTOBER TERM, 1989

AMAZING STORES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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LINDA SHER
Assistant General Counsel
National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether, in a case in which the National Labor Relations Board determined that petitioner's numerous unfair labor practices were "pervasive, serious and committed by the highest management officials," the Board adequately considered the effect of employee turnover on the need for a bargaining order.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1190

AMAZING STORES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is reported at 887 F.2d 328. The decision and order of the National Labor Relations Board (Pet. App. A9-A13) is reported at 289 N.L.R.B. No. 24.

JURISDICTION

The judgment of the court of appeals (Pet. App. A58) was entered on October 20, 1989. The petition for a writ of certiorari was filed on January 18, 1990. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner owns and operates a chain of retail discount stores in the Philadelphia area. The United Food and

Commercial Workers, Local 1357, AFL-CIO (Union) began organizing certain employees in petitioner's nine stores in late October 1985. The Union quickly received cards requesting Union representation from 23 of the 36 employees in the bargaining unit. Pet. App. A21-A22. The Union then asked petitioner to recognize it as the employees' bargaining representative. *Ibid.* The administrative law judge found (Pet. App. A41) that petitioner responded with:

> [a] calculated plan of coercion and intimidation orchestrated and implemented by [owners] Joseph Lieberman and Jack Segal, through individual meetings with all but one of the Company's employees. The centerpiece of the campaign was the constantly repeated assertion of Lieberman or Segal or both in these meetings where they each applied pressure to the unaccompanied, sometimes frightened, individuals by means of threats that the stores were going to be closed or sold to Koreans who, in turn, would hire their own relatives and discharge the current employees. The threats uttered at the individual meetings were given additional substance by appearances of Lieberman and Segal accompanied by one or more oriental persons, a theatrical device I have found to have been staged by Segal in order to heighten the employees' anxieties.

Petitioner also threatened to withhold (and did delay) payment of Christmas bonuses, coercively interrogated employees, created the impression that union activities were under surveillance, and promised benefits in order to discourage the employees' support for the Union. Pet. App. A44, A25-A35. In addition, petitioner denied union activist Ralph Atwell a Christmas bonus and a raise because he had given petitioner "too much grief about the Union." Pet. App. A11, A31, A35; Tr. 148-152, 164-165. Finally, petitioner denied a Christmas bonus to, and then discharged,

Gail Davis because she was the only employee who refused to discuss the union campaign with Segal. Pet. App. A10, A38-A39. The Union lost the representation election.

2. On the basis of charges filed with the National Labor Relations Board, a complaint was issued alleging that petitioner had engaged in unfair labor practices during the election campaign. Pet. App. A18. An administrative law judge found, after a hearing, that petitioner had violated Section 8(a)(1) and (3) of the Act, 29 U.S.C. 158(a)(1) and (3), by the conduct set out above. Pet. App. A44. The ALJ further found that: (1) the Union had majority support of the unit employees at the time it requested recognition by petitioner, (2) petitioner's refusal to recognize and bargain with the Union constituted an unfair labor practice, and (3) a bargaining order was warranted under this Court's decision in *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969). Pet. App. A41-A42. In concluding that lesser remedies would not protect the employees' rights, the ALJ explained (*ibid.*):

> I discerned not one iota of regret or remorse that [Lieberman and Segal] had done these things. I have no doubt that if, as the result of my recommendations in this case, a second election were to be ordered, Lieberman and Segal would find the means to let their employees know that their joint will is unchanged and that the advent of the Union would mean the end of their connection with Amazing Stores.
>
> It is for the last reason, more than the other unfair labor practices, even the mistreatment of Ralph Atwell and the discharge of Gail Davis, that I feel that the ordinary remedies of notice posting, cease and desist, and a new election would not properly protect the rights of the employees here so egregiously disregarded, and that a bargaining order, as requested by the General Counsel, would be the most appropriate remedy.

The Board affirmed the ALJ's decision and adopted his recommended remedial order with certain modifications not relevant here. Pet. App. A9. The Board also denied petitioner's motion to reopen the record to gather evidence concerning the turnover of employees in the bargaining unit. The Board explained that the unfair labor practices "were pervasive and serious," were "committed by highest management officials," and were "directed at virtually every employee in the bargaining unit." *Id.* at A9-A10 n.2. In those circumstances, the Board found that it was "foreseeable that [petitioner's] record of coercion would become known to new employees and the impact of [its] violations would be likely to persist despite any turnover, thus preventing the holding of a fair election." *Ibid.*

3. The court of appeals upheld the Board's decision and enforced its bargaining order. Pet. App. A2. The court rejected petitioner's contention that its misconduct was not sufficiently serious to warrant a bargaining order. *Id.* at A4. It also rejected petitioner's contention that the Union had not demonstrated majority support of the unit employees. *Ibid.* Petitioner does not challenge those rulings in this Court.

The court of appeals also ruled that the Board had properly denied petitioner's motion to reopen the record to show that the turnover of employees in the unit had eliminated the need for a bargaining order. The court stated that "determination of whether a *Gissel* order is necessary rests on consideration of both the nature and pervasiveness of the employer's misconduct as well as the amount of turnover." Pet. App. 6. The court noted that, in a case such as this one, "[w]here the Board finds that a practice is particularly pervasive or enduring, it need make only minimal findings that the effects have not been dissipated by subsequent employer turnover." *Ibid.* The court explained (*id.* at A7):

> Where the Board finds that the employer misconduct is pervasive and likely to persist despite turnover, these

> conclusions alone are sufficient to satisfy the turnover inquiry. Forcing the NLRB to question new employees as to their knowledge of earlier representation elections is not only unnecessary to support its conclusion, but also would have the bizarre effect of alerting new employees to their employers' antipathy to union organization.

The court of appeals therefore upheld the Board's finding that the turnover of employees in the bargaining unit "was not sufficient to dissipate management's entrenched and pervasive misconduct." Pet. App. A7.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Thus, no further review is warranted.

1. In *NLRB* v. *Gissel Packing Co.*, *supra*, this Court held that the Board has authority to order an employer to bargain with a union even though the union did not win a Board-sponsored election. The Board may issue such an order in a case where the employer's unfair labor practices "have the tendency to undermine majority strength and impede the election process." 395 U.S. at 614. The Court ruled that the Board may order an employer to bargain with an unelected union whenever it finds "that the possibility of erasing the effects of past practices and of ensuring a fair election * * * is slight and that employee sentiment once expressed through [union-authorization] cards would, on balance, be better protected by a bargaining order." *Id.* at 614-615.

Petitioner does not dispute the Board's finding that petitioner's misconduct was so serious and pervasive as to warrant a bargaining order under the *Gissel* standard. Rather, petitioner contends that the Board failed to assess the ef-

fect of employee turnover on the current propriety of imposing such a bargaining order. That contention is without merit.

The Board plainly did not fail to analyze the effect of employee turnover. Rather, as the court of appeals observed, the Board showed "due concern for the employees' Section 7 rights by considering the impact of turnover, and determining that it was not sufficient to dissipate management's entrenched and pervasive misconduct." Pet. App. A7. The Board simply disagreed with petitioner's basic claim that employee turnover had eliminated the need for a bargaining order. The Board found petitioner's claim to be unpersuasive because its unfair labor practices were: (1) pervasive and serious, (2) "committed by the highest management officials," and (3) "directed at virtually every employee in the bargaining unit." *Id.* at. A9-A10 n.2. Thus, it was "foreseeable that [petitioner's] record of coercion would become known to new employees and the impact of [petitioner's] violations would be likely to persist despite any turnover." *Id.* at A10 n.2. Moreover, as the Board and court of appeals noted, petitioner's owners could be expected to "resume their misconduct" if a second election were scheduled. *Id.* at A8, A41-42. In short, the Board and the court of appeals considered the question of turnover in the bargaining unit. They simply and correctly disagreed with petitioner's contention that turnover required a new election.

2. Contrary to petitioner's assertion (Pet. 7-8), there is no conflict between this case and the decisions of the Second Circuit. As petitioner notes, the Second Circuit has consistently required the Board to consider employee turnover before it issues a *Gissel* bargaining order. See, *e.g.*, *NLRB* v. *J. Coty Messenger Service, Inc.*, 763 F.2d 92 (2d Cir. 1985); *NLRB* v. *Pace Oldsmobile, Inc.*, 739 F.2d 108 (2d Cir. 1984); *NLRB* v. *Knogo Corp.*, 727 F.2d 55 (2d Cir. 1984). Here, the Board did consider the effect of turnover

on the need for a bargaining order. And, for the reasons stated above, the Board reasonably found that turnover had not, and would not, dissipate the effects of petitioner's unfair labor practices. Accordingly, the Board satisfied the Second Circuit's requirement before it issued the bargaining order.[1]

Nor was the Board required to delay its remedial order by granting petitioner's request to reopen the record to hear new evidence on the matter of turnover. The Board assumed that there had been significant turnover, and petitioner has pointed to no other new evidence that would have been relevant to the Board's inquiry under *Gissel*. Thus, there was no reason for the Board to reopen the record to receive new and irrelevant evidence. See *NLRB* v. *L.B. Foster Co.*, 418 F.2d 1, 4-5 (9th Cir. 1969), cert. denied, 397 U.S. 990 (1970).[2]

---

[1] The decision below also does not conflict with the other decisions that petitioner cites. In *NLRB* v. *Century Moving & Storage, Inc.*, 683 F.2d 1087, 1094-1095 (7th Cir. 1982), the court refused to enforce a bargaining order because the violations were not "outrageous" or "pervasive," "had little immediate or residual impact," and were mitigated by reinstatement of the illegally laid-off employees. The court said that its decision was "bolster[ed]" by the circumstance that two of five card-signers were no longer in the unit. 683 F.2d at 1094. In *NLRB* v. *Western Drug*, 600 F.2d 1324, 1326 & n.5 (9th Cir. 1979), the court refused to enforce a bargaining order where all three employees in the unit voluntarily resigned before the unfair-labor-practice hearing. The court cautioned that it held "only that the Board must consider events occurring before the administrative hearing." 600 F.2d at 1326 n.5. Neither case is inconsistent with the decision in this case to enforce a bargaining order where the Board found that the illegal practices were severe, widespread, and likely to be repeated.

[2] Petitioner incorrectly contends (Pet. 8) that the Second Circuit requires the Board to reopen a proceeding on the eve of issuing a bargaining order in order to consider evidence of turnover. The Second Circuit (like the D.C. Circuit) requires the Board to consider turnover;

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

JOHN G. ROBERTS, JR.
*Acting Solicitor General**

JERRY M. HUNTER
General Counsel

D. RANDALL FRYE
Associate General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel
National Labor Relations Board

FEBRUARY 1990

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it does not require the Board to reopen the evidentiary record whenever the employer so requests.

* The Solicitor General is disqualified in this case.

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Supreme Court, U.S.
FILED
MAR 12 1990
JOSEPH F. SAPNIOL, JR.
CLERK

No. 89-1190

In the Supreme Court of the United States

October Term, 1989

AMAZING STORES, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondents.

REPLY BRIEF OF PETITIONER

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ARGUMENT

In its petition, Amazing Stores argued that respondent NLRB had disregarded the rights of petitioner's present employees under § 7 of the NLRA by compelling *Gissel* bargaining without hearing evidence concerning the effect of the 95% turnover in employment in the bargaining unit since the unfair labor practices. In addition, petitioner pointed out that the decision of the District of Columbia Circuit was in direct conflict with decisions of other circuits, particularly the Second Circuit.

In his brief in opposition, the acting Solicitor General sought to describe the NLRB's decision that turnover had not dissipated the effect of the unfair labor practices as a reasonable resolution of the factual question of the effect of turnover, even though the administrative law judge had never taken testimony concerning the effect of turnover or made findings on that issue. In addition, by treating the issue as one of sufficiency of the evidence to support the NLRB's findings, the acting Solicitor General sought to explain away the conflict among the circuits.

I. THERE WAS NO FACTUAL BASIS UNDERLYING THE BOARD'S CONCLUSION THAT TURNOVER DID NOT DISSIPATE THE EFFECT OF THE UNFAIR LABOR PRACTICES.

Respondent points to two statements as evidence that the factual question of the effect of 95% turnover in the workforce since the unfair labor practices had been weighed and the issue resolved in favor of a determination that turnover did not eliminate the need for a *Gissel* order.

First, the administrative law judge stated that he had "no doubt" that petitioner's management would "let their employees know that their joint will is unchanged . . ." Op. Cert. at 3, quoting Pet. App. A41. But it is clear that the administrative law judge was not considering the possible effect of turnover when he reached this conclusion. Rather, the ALJ was postulating a workforce which had already been exposed

to unfair labor practices and could be reminded of those practices. When, in the months that the case was pending before the NLRB, the turnover in employees reached 95%, petitioner asked the Board to remand to consider the effect of that turnover, but the Board refused.

The turnover and passage of time is material. A workforce that had been involved in a recent heated organizing campaign and an equally heated opposition to that campaign could be expected to react strongly to the actions of petitioner's managers who had led that opposition. New employees would have no such sensitivity. More to the point, they might either be such stalwart unionists that no actions by petitioner's managers could affect them or such right-to-work enthusiasts that those managers would perceive no need to act. Respondent was simply incorrect in viewing the administrative law judge's statements made in another context as a determination that turnover had not dissipated the effects of the unfair labor practices.

Second, respondent points to the language in footnote 2 of the Board's Opinion, Pet. App. A9-A10 n.2, explaining why the Board had denied petitioner's motion to reopen the record, as evidence of the effect of employee turnover. Because the unfair labor practices were pervasive, directed at virtually every employee, serious and committed by top management, the Board concluded that it was "foreseeable that [petitioner's] record of coercion would become known to new employees and the impact of [its] violations would be likely to persist despite any turnover, thus preventing the holding of a fair election." Op. Cert. at 4. This is simply a prediction that turnover will have no effect without allowing the ALJ to take evidence or make findings on that question.

Nevertheless, in describing the Board's action, respondent argues: "The Board simply disagreed with petitioner's basic claim that employee turnover had eliminated the need for a bargaining order." Op. Cert. at 6. But the Board never made any such finding. Rather, having refused to hear any

evidence on the question, the best it could say was that the impact of earlier violations "would be likely to persist" and thus prevent a fair election. Yet the Court of Appeals affirmed. The denial of the present employees' § 7 rights should not be based on such speculation and prediction.

II. THERE IS A CLEAR CONFLICT BETWEEN THE DECISION BELOW AND THE NUMEROUS DECISIONS OF THE SECOND CIRCUIT REQUIRING THE NLRB TO BASE THE EVALUATION OF THE EFFECT OF TURNOVER ON FACT RATHER THAN PREDICTION.

Respondent seeks to explain away the conflict in circuits by arguing that the Board "plainly did not fail to analyze the effect of employee turnover," Op. Cert. at 6, and, accordingly, followed the same rule as the Second Circuit which likewise "has consistently required the Board to consider employee turnover before it issues a *Gissel* bargaining order," *id.*

The conflict, however, is plain. In the cases considered by both courts, the Board has refused to reopen the record for evidence of the effect of turnover and has been satisfied on the basis of evidence concerning the seriousness of the violation that turnover has not dissipated the need for a bargaining order. As we noted above, the court below, citing the language of the Board and the ALJ, held that evidence of the seriousness of the violation was sufficient to prove that even 95% turnover did not dissipate the effect of the unfair labor practices. Accordingly, the court below held, the *Gissel* bargaining order could be upheld without reopening the record.

By contrast, the Second Circuit has consistently held that evidence of the seriousness of the unfair labor practices cannot support a conclusion that turnover has not dissipated the effect of those practices. *See, e.g., NLRB v. J. Coty Messenger Service, Inc.*, 763 F.2d 92, 100 (2d Cir. 1985) (not enough that "hallmark violations" were "likely to have a lasting inhibitive effect on a significant portion of the workforce" and "in view of the high-level management source of the threats and the

small size of the workforce, a fair election was 'doubtful, if not impossible.'"); *NLRB v. Pace Oldsmobile, Inc.*, 739 F.2d 108, 111 (2d Cir. 1984) (not enough that "employer's actions were serious," their impact was "enduring," "the coercive, chilling impact would linger long after the strike participants had either returned to or departed from [Pace's] employ" and "the employer has engaged in 'hallmark' violations such as the discharge of union adherents and the threat of plant closure."); and *NLRB v. Knogo Corp.*, 727 F.2d 55, 60 (2d Cir. 1984) (not enough that there was "a pervasive pattern of unfair labor practices," including "'hallmark' violations").

There is a direct conflict of circuits, as even a quick comparison of the language of the Second Circuit with the language relied upon by the court of appeals below makes clear. In the Second Circuit, if the NLRB chooses to answer the question of whether turnover has dissipated the need for a *Gissel* order by looking to the violations which constituted the unfair labor practice rather than to the effects of turnover since the violations, the Court of Appeals will reverse. In the District of Columbia Circuit, similar justification led to an affirmance in this case. There is no better test for a conflict in circuits than that the results will be different depending upon which circuit is involved.

Because petitioner's new employees will be represented by a union they had no part in choosing if the *Gissel* bargaining order is enforced, Section 7 of the NLRA requires a real determination whether the bargaining order is still needed in the face of such turnover.

CONCLUSION

FOR ALL OF THESE REASONS, in addition to the reasons set forth in the petition for certiorari, petitioner respectfully requests that its petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia be granted.

Respectfully submitted,

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